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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MELISSA ANN DAVIS, *Appellant*.

No. 1 CA-CR 16-0013
FILED 11-1-2016

Appeal from the Superior Court in Maricopa County
No. CR2015-108140-001
The Honorable David O. Cunanan, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Steve Warren McCarthy, Tennie B. Martin
Counsel for Appellant

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MEMORANDUM DECISION

Judge Thomas C. Kleinschmidt¹ delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jon W. Thompson joined.

KLEINSCHMIDT, Judge:

¶1 Melissa Ann Davis appeals from her convictions and sentences for possession or use of narcotic drugs and possession or use of marijuana. Davis asserts the prosecutor committed fundamental error by mischaracterizing the evidence during closing arguments. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Phoenix Police received reports of suspicious activity at a house on Washington St. between 27th and 35th Avenues and dispatched Officer Scott Linker to conduct a surveillance. In the span of forty-five minutes, Officer Linker saw between ten and fifteen people enter and leave the house. Shortly thereafter, he saw an African-American man and woman walk away from the vicinity of the house and get into a black car. Linker asked another undercover officer, Officer Mankin, to stop the car and investigate the occupants and Mankin relayed this request to officers in a marked car. These officers spotted the car two blocks from the house under surveillance and stopped it within a few minutes of the original request being made.

¶3 Officer Scott Jordan and his partner pulled over a black Lincoln near 35th Avenue and Van Buren. Chester Player was driving the vehicle and Davis was in the passenger seat. When Officer Jordan asked Davis for identification she removed her ID from her purse which was next to her feet. After identifying Davis and Player, officers arrested both for reasons unrelated to the surveillance of the house. While conducting an inventory search of the vehicle, Officer Jordan found a plastic bag containing marijuana and a plastic vial containing crack cocaine inside Davis's purse. Officer Jordan later questioned Davis at the station. During

¹ The Honorable Thomas C. Kleinschmidt, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

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questioning, Davis told Officer Jordan they had been coming from the area of 27th Avenue and Van Buren.

¶4 At trial, Officer Jordan testified that Davis told him the car belonged to Player, her boyfriend, and that the marijuana, crack cocaine and money found in her purse were his. When asked why the cocaine was in her purse, she said she guessed her boyfriend “threw it in there.” She also admitted that she used crack cocaine almost daily.

¶5 Officer Jordan asked Davis if she was helping her boyfriend by carrying the drugs and she replied, “[j]ust that stuff.” Jordan then asked “[s]pecifically, the weed and the crack that was in your purse?” To which Davis responded, “[y]es.”

¶6 The State charged Davis with possession or use of narcotic drugs and possession or use of marijuana. At the jury trial, Davis was found guilty as charged and the trial court imposed concurrent sentences of 2.5 years for possession or use of narcotic drugs and 1 year for possession or use of marijuana. This timely appeal follows, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(1) (2016), 13-4031 (2016) and -4033 (2016).²

DISCUSSION

¶7 Davis argues that the prosecutor improperly characterized the evidence in closing argument. Because Davis failed to object to the prosecutor’s statement at trial, we apply fundamental error review. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). Fundamental error is error that goes to the foundation of the case, deprives a defendant of a right essential to his defense, and is of such magnitude that he could not possibly have received a fair trial. *Id.* at ¶ 19. Davis thus carries the burden of showing not only that there was fundamental error, but also that she was prejudiced by it. *Id.* at ¶ 20.

¶8 A court will evaluate alleged prosecutorial misconduct to determine if an error occurred and, if so, its effect. *State v. Goudeau*, 239 Ariz. 421, 465, ¶ 193 (2016) (citations omitted). Prosecutors are given wide latitude during closing argument and may (1) summarize evidence, (2) make submittals to the jury, (3) ask the jury to draw reasonable inferences, and (4) suggest conclusions. *Id.* at 466, ¶ 196. When determining whether

² Absent material revision after the date of an alleged offense, we cite a statute's current version.

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a closing argument rises to prosecutorial misconduct the court considers “(1) whether the prosecutor’s statements called to the jury’s attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks.” *Id.* (citations omitted). The court considers both the context in which the statements were made, as well as the entire record and the totality of the circumstances. *Id.*

¶9 Davis specifically argues that the prosecutor misstated the evidence so as to link her to the house that Officer Linker had under surveillance. She points out that during his testimony, Officer Linker, an experienced narcotics officer, clearly implied that the house he was watching was a house from which drugs were being sold. The major thrust of Davis’s argument is that her statement regarding knowledge of the cocaine in her purse was ambiguous, so that linking her to the house was critical to the state’s case.

¶10 Officer Linker testified as follows:

Q: Around 5:50 p.m. did you see anyone come out of the house?

A: Yes, I did.

Q: Who did you see come out of the house?

A: I saw two individuals come out - or I didn’t see them exactly come out of the door. I saw them walking from the general area of the house to a black Lincoln passenger vehicle. Two individuals entered the vehicle and then left westbound on Washington. I believe it was a [sic] older male and also a younger female with them.

* * *

Q: Okay, and you said that you had seen a [sic] older, black Lincoln?

A: Yes.

Q: All right. And did you see any blemishes on that vehicle?

A: From my distance - from the distance I was away, I wasn’t sure. I knew it was a black sedan at that point. I wasn’t even 100 percent sure it was a Lincoln.

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¶11 What the prosecutor argued was:

Let's just review the evidence as you've heard them today. That day, around 5 p.m., Officer Scott Linker was conducting surveillance on a house off Washington. He said the major street roads are Van Buren and 27th Avenue.

He said about 5 p.m. he was watching – still bright outside – he was watching with binoculars. And people were coming to and fro, a lot of traffic. Foot traffic, bicycles, people staying there for short periods of time, coming back and forth.

He said around 5:50 p.m., he saw an African-American male individual with a female individual come out and get into a black Lincoln car and drive off. He alerted Officer Mankin.

¶12 The prosecutor also argued, “[Davis] told the officer that she was coming from her boyfriend’s house. Her boyfriend was the driver. They had been together for three years. The house was off of 27th Avenue and Van Buren. The house that Officer Linker was originally watching.”

¶13 Davis asserts the prosecutor misstated the evidence because (1) Officer Linker did not testify that he saw the two individuals come out of the house, (2) he could not say for sure that the black car was a Lincoln, and (3) that the house under surveillance was at 28th Drive and Washington, not 27th Avenue and Van Buren, and there is no evidence that the defendant’s boyfriend had a house at 28th Drive and Washington.

¶14 This was prejudicial, Davis argues, because it linked her to a drug house and her boyfriend’s drug dealing for three years, and leaves in doubt whether the car that was stopped is the same one Officer Linker saw leave the house he had under surveillance.

Statements alleging Davis was coming from the house being surveilled by Officer Linker when she was stopped.

¶15 Davis first argues that the prosecutor mischaracterized the evidence by stating that Davis “told the officer that she was coming from her boyfriend’s house. . . . The house was off of 27th Avenue and Van Buren. The house that Officer Linker was originally watching.” Davis contends that Officer Linker testified that he did not actually see Davis come out of the door of the house, and that when officers asked her where she was coming from, Davis gave only the nearest major crossroads to the house

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being surveilled by Officer Linker, not the specific neighborhood crossroads of the house itself.

¶16 While there was no direct evidence at trial that Davis came out of the door of the house being watched by Officer Linker, there is certainly evidence in the record to reasonably infer such a finding. Officer Linker testified that he did not see the man and the woman who left the house “come out of the door,” but he did see them “walking from the general area of the house.” Furthermore, while Davis did not say specifically where she and Player were coming from, she did mention that they were coming from “the area of 27th Ave and Van Buren,” which are the nearest major crossroads to the house that was being surveilled by Officer Linker. Accordingly, the prosecutor’s suggestion to the jury that Davis was coming from the house that Officer Linker was watching is a reasonable inference and not prosecutorial misconduct. *See Goudeau*, 239 Ariz. at 466, ¶ 196.

Argument that Davis was the woman seen by Officer Linker leaving the house and getting into a black Lincoln.

¶17 Davis also claims that the prosecutor mischaracterized the evidence by stating that Officer Linker “saw an African-American male individual with a female individual come out and get into a black Lincoln car and drive off.” Davis contends that Officer Linker later testified that he “wasn’t even 100 percent sure” that the car was actually a Lincoln, and therefore there was no evidence that the African-American couple that Officer Linker watched get in a black passenger vehicle was in fact Davis and Player.

¶18 As to the identity of the car, again there is sufficient evidence in the record to allow the prosecutor to ask the jury to draw such a reasonable inference. While Officer Linker may not have been sure, he testified that he believed the black passenger car leaving the house was a Lincoln. In addition, he directed another officer to stop the vehicle as it was leaving the neighborhood, and the vehicle that was stopped by Officer Jordan nearby was in fact a black Lincoln. Finally, the occupants of that black Lincoln, Player and Davis, matched the description given by Officer Linker of the couple he saw exit the area of the house and enter a black vehicle. The prosecutor’s statements were a reasonable summary of the evidence. *See Id.*

¶19 Under the totality of the circumstances, nothing Davis describes as a mischaracterization of the evidence comes close to

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fundamental error. Moreover, she makes no showing of prejudice and exaggerates the significance of the prosecutor's comments connecting her to the house. The evidence against Davis, quite apart from any connection to the house, was very strong. Davis admitted that she used crack cocaine almost daily, she was found in actual possession of the drug, and the jury could reasonably interpret her statement as an admission of knowledge of possession.

CONCLUSION

¶20 We affirm Davis's convictions and sentences.



AMY M. WOOD • Clerk of the Court
FILED: AA